Supreme Court, U.S.
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No. 95-683

In The
Supreme Court of the United States
October Term, 1995

JAN PARTIN,

Petitioner,

v.

STATE OF FLORIDA,
COMMISSION ON ETHICS,

Respondent.

Petition For A Writ Of Certiorari To The District Court Of Appeal Of Florida For The Second District

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REPLY TO BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. WHETHER PETITIONER TIMELY RAISED THE FEDERAL QUESTIONS IN STATE COURT.

II. WHETHER PETITIONER HAS DEMONSTRATED THAT THE FLORIDA APPELLATE COURT'S DECISION INCORRECTLY RESOLVED THE FEDERAL QUESTIONS REGARDING HER RIGHTS UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION.

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REASONS TO GRANT THE WRIT

I. PETITIONER TIMELY RAISED THE FEDERAL QUESTIONS IN THE STATE COURT

a. Petitioner Was Not Required to Raise the Federal Questions until the Appeal to the Second District Court of Appeal.

Respondent argues that Defendant never raised her constitutional claims in the proceeding before the Commission and waited until the filing of her appellant brief to allege such defects. However the cases cited by Respondent do not pertain to constitutional objections. Indeed, the facial constitutionality of a statute may not be decided in an administrative proceeding in Florida. *Key Haven Associated Enterprises, Inc. v. Board of Trustees of the Internal Improvement Trust Fund*, 427 So. 2d 153, 157 (Fla. 1982). In *Key Haven*, the Florida Supreme Court stated that the facial constitutionality of a statute cannot be addressed until the administrative process is concluded and the claim is before the District Court of Appeal on direct review of the agency action. 427 So. 2d at 157. In *Key Haven*, the Florida Supreme Court also stated that a claim that an agency has applied a facially constitutional statute in a way that the aggrieved party's constitutional rights have been violated is similarly to be determined by the District Courts of Appeal. The court stated as follows:

> The district courts provide a proper forum to resolve this type of constitutional challenge because those courts have the power to declare the agency action improper and to require any modifications in the administrative decision-making process necessary to render the final

agency order constitutional. 427 So. 2d at 158.

In *Rice v. Department of Health and Rehabilitative Services*, 386 So. 2d 844 (Fla. 1st DCA 1980) the court held that the District Court of Appeal had the power to decide constitutional questions on administrative appeals. With respect to questions not passed on or presented to a trial court the court noted that an appellate court ordinarily would not take up such questions. However the court stated as follows:

> That practice need not deter us from considering freshly raised questions of constitutional law, or any question of law which inheres in the case and may fairly be decided on the record, in appeals from agency action. For in reviewing agency action we are not reviewing the judgment of another court of law, and the deference due the agency is of another kind, less for its judgment on questions of law than for its greater familiarity with the statutory scheme and its expertise in the field regulated. Moreover, when an appeal is taken from agency action to a district court, that is the first court to receive the case and is the first tribunal to which a claim of statutory unconstitutionality can effectively be made. The district court's ultimate task under §120.68 is to review agency "action," not agency judgments, and the district court is empowered to review that "action" completely, though all dispositive legal issues were not or could not have been decided by the agency. 386 So. 2d at 849-850.

In the instant case, the Petitioner had no obligation to

raise the unconstitutionality of the statutory penalty in the administrative agency under Florida law. Therefore, Respondent's argument that her failure to raise those issues constituted an independent state ground for the decision of the Second District Court of Appeal is without merit.

It is significant to note that Respondent does not dispute that Petitioner adequately raised the federal issues in the Second District Court of Appeal.

b. This Court Has Granted Certiorari in Cases Where the Intermediate Appellate Court Does Not Render a Written Opinion.

Respondent argues that without a written opinion it cannot be concluded that the state court decided the federal questions asserted by the Petitioner. Respondent's argument is without merit. In *Palmore v. Sidoti*, 466 U.S. 429 (1984) the Florida trial court entered an order modifying the child custody portion of a final judgment of dissolution of marriage. In its order, the trial court did not specifically rule on Palmore's Fourteenth Amendment objection. The Second District Court of Appeal affirmed that order but did not render a written opinion. Nevertheless, this court granted certiorari to review the federal questions presented by decision of the appellate court affirming the trial court's order. This Court held that the decision violated the Fourteenth Amendment.

In *Ibanez v. Florida Board of Accountancy*, 114 S.Ct. 2084 (1994), the Florida Board of Accountancy entered an order disciplining the petitioner. The First District Court of Appeal affirmed that decision but did not render a written opinion. Nevertheless, this court granted certiorari to review the federal issues presented in that order affirming the agency

decision.

In the instant case, although the Second District Court of Appeal did not render a written order this is no bar to the granting of a petition of certiorari.

c. Any Objection in the Administrative Proceedings That the Penalty Statute Was Unconstitutional on its Face or as Applied Would Have Been Futile.

As Respondent has noted, the Florida courts have concluded that Commission on Ethics proceedings and Code of Ethics provisions are civil and not criminal. Indeed, in *D'Alemberte v. Anderson*, 349 So. 2d 164, 168 (Fla. 1977) the Florida Supreme Court held that Florida Statute §112.313 is not criminal and the penalties assessed thereunder are non-criminal. Accordingly, any objection to the administrative proceeding would have been futile. Furthermore, the fact that the Florida Supreme Court has already ruled that the penalties assessed under the act are "non-criminal" strengthens the conclusion that the Second District Court of Appeal was merely following the Florida Supreme Court's prior ruling on this issue which was argued by the Respondent in the Second District.

d. The Federal Question Presented by the Unconstitutionality of the Penalty Statute Was So Central as to Preclude Any Independent and Adequate State Ground.

In light of Petitioner's unrefuted arguments in the Petition that the penalty constituted a punishment, the order of the Commission on Ethics which was reviewed on appeal by the Second District Court of Appeal does not contain an

adequate and independent state ground to support the penalty. Respondent does not even argue that it does. Instead, Respondent relies solely on Petitioner's failure to raise the federal question during the administrative proceeding. Because Petitioner raised the federal question regarding the constitutionality of the penalty in the Second District Court of Appeal, the Second District Court of Appeal's decision affirming the order of the Commission on Ethics necessarily operated as a denial of the federal claim. This Court's jurisdiction over the case is thus established. Because there was no adequate state ground to support the imposition of the penalty in light of Petitioner's constitutional arguments, the decision of the Second District Court of Appeal affirming the penalty was necessary to a determination of the cause. Indeed, Respondent has completely failed to demonstrate that any substantive state ground accounted for the decision below. In *Durley v. Mayo*, 351 U.S. 277, 281 (1956) this court stated as follows:

> It is likewise settled that if the independent [state] ground was not a substantial or sufficient one, "it will be presumed that the state court based its judgment on the law raising the federal question, and this court will then take jurisdiction."

Contrary to Respondent's arguments, the jurisdiction of this court cannot be defeated simply because the intermediate state appellate court did not write an opinion.

II. PETITIONER HAS DEMONSTRATED THAT THE FLORIDA APPELLATE COURT'S DECISION INCORRECTLY RESOLVED THE FEDERAL QUESTIONS REGARDING HER RIGHTS UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION.

a. Procedural Safeguards of Criminal Prosecution.

It is significant to note that Respondent has not even addressed the test adopted by this Court in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963) for the determination of whether an ostensibly civil sanction constitutes a criminal punishment. Obviously, the reason is that the application of the criteria to the statutory penalty in question results in the necessary conclusion that the penalty constituted a punishment.

Instead, Respondent relies on the fact that the Florida courts have already concluded that the Commission on Ethics proceedings and Code of Ethics provisions are civil and not criminal. However, this Court is the ultimate arbiter of the constitutionality of the penalty provision.

Citing *Commission on Ethics v. Sullivan*, 489 So. 2d 30 (Fla. 1986) Respondent also argues that under §112.324(7) Fla. Stat., the Respondent cannot "impose" any penalty; it can only "recommend." However, the characterization of the Commission on Ethics order as a "recommendation" of a penalty is a misnomer. Petitioner pointed out in the Petition that the Florida Supreme Court more recently stated that the statutory scheme was penal because it "imposes a penalty." *City of Miami Beach v. Galbut*, 626 So. 2d 192, 194 (Fla.

1993). The courts in Florida have referred to the act as "imposing severe penalties." *Barker v. State of Florida, Commission on Ethics*, 654 So. 2d 646, 649 (Fla. 3d DCA 1995)(See Petition, p. 15).

Indeed, in the Recommended Order the Hearing Officer stated that "Section 112.317, Fla. Stat."establishes the type of penalties which may be imposed for violations of the Code of Ethics . . ." (App. 21, paragraph 21). Furthermore, there can be no doubt that unless the District Court of Appeal sets aside or modifies the agency action which includes the penalty the decision of the Commission on Ethics is final as to the Petitioner. In any event, the Florida Supreme Court's earlier characterization of the Commission's action as a "recommendation" is not binding on this Court.

In *United States v. Ward*, 448 U.S. 242 (1980), the Coast Guard assessed a civil penalty against Ward. Ward filed an administrative appeal from that ruling contending that the act violated his privilege against compulsory self-incrimination. The administrative appeal was denied. Ward filed suit in U.S. District Court seeking to enjoin the Secretary of Transportation from enforcing the statute and from collecting the penalty of $500.00. 448 U.S. at 246-247. The fact that the penalty had not been collected in no way precluded this Court's consideration of Ward's constitutional arguments.

Section 112.317(2) Florida Statutes empowers the Attorney General to bring a civil action to recover the penalty determined by the Commission on Ethics.

Therefore, irrespective of the previous misnomer applied by the Florida Supreme Court that the Commission only "recommends" a penalty, there can be no doubt that all judicial

consideration and review of the penalty in the Florida courts has already taken place. Respondent cannot seriously contend that there is any further review of the penalty available in the Florida courts.

Respondent further argues that Petitioner was represented by counsel and did not assert a right to remain silent under the Fifth Amendment in the administrative proceeding. However, the state statute provided an administrative proceeding to Petitioner which the Supreme Court of Florida already characterized as giving to Petitioner all the due process to which she is entitled. *Debusk v. Smith*, 390 So. 2d 327, 328 (Fla. 1980). It was incumbent upon the State of Florida to provide a procedure commensurate with the imposition of a punishment which amounted to a second degree felony. Petitioner could not have anticipated that such a penalty would have been imposed. Consequently, Petitioner could not have known during the administrative proceedings that the penalty would constitute a criminal punishment until the conclusion of the proceeding when the penalty was assessed. She could not have known to assert her constitutional rights. It is sufficient that she timely appealed and argued the federal questions with respect to the penalty before the District Court of Appeal.

Respondent cites *U.S. v. Ward*, 448 U.S. 242 (1980) for the proposition that the penalty imposed in this case was not so punitive as to transform a civil remedy into a criminal penalty. However, Respondent has failed to point out that in *Ward*, the statute in question provided as follows:

> Any such civil penalty may be compromised by such Secretary. In determining the amount of the penalty, or the amount agreed upon in

> compromise, the appropriateness of such penalty to the size of the business of the owner or operator charged, the effect on the owner or operator's ability to continue in business, and the gravity of the violation, shall be considered by such Secretary. 448 U.S. at 245 n.5.

Further, the penalties assessed under the statute in *Ward* were to be paid into a fund used to finance the removal, containment or dispersal of oil and hazardous substances discharged into navigable waters and to defray the costs of administering the act. 448 U.S. at 246. However, in the case sub judice, the monies collected under the so-called "civil penalty" and "restitution penalty" are paid to the state general revenue fund rather than to the victim or a specific fund for the administration on the Commission on Ethics. §215.32(2)(a), Fla. Stat. Furthermore, the statute under consideration in the *Ward* case did not require proof of scienter as does the statute under consideration here. 448 U.S. at 249.

Finally, the statute under consideration in the *Ward* case had a criminal statute counterpart which included criminal penalties. This is not the case with §112.313(6) Florida Statutes. In fact, the predecessor to §112.317(1) made a violation of the §112.313 a criminal offense punishable as a first degree misdemeanor. However the Legislature repealed the criminal penalty leaving the so-called "civil penalties" intact. (See Petition, page 14). Therefore, there are critical and dispositive aspects of the penalty provision contained in §112.317 Fla. Stat. which are different than *Ward* or any other case.

CONCLUSION

Respondent has totally failed to rebut the points contained in the Petition for Writ of Certiorari. Section 112.317(1) Fla. Stat. authorizes the Commission on Ethics, a state agency, to impose, without any guidelines, a criminal punishment for what was formerly, under the statute, the crime of corruption. Although previously a first degree misdemeanor, the criminal punishment, equivalent to a second degree felony, masquerades as a "civil penalty." The punishment is not subject to review by any court so long as it is within the statutory guidelines. The $5,000.00 statutory maximum for the "civil penalty" in this case was exceeded by the assessment of an additional $1,200.00 so-called "restitution penalty" which is in fact an additional punishment.

As such, the penalty constitutes "punishment" for the reasons outlined in the Petition. This Petition for Certiorari should be granted.

Respectfully submitted,

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